

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANGELO JARMAL OWENS,

Defendant-Appellant.

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UNPUBLISHED

March 20, 2014

No. 313073

Wayne Circuit Court

LC No. 11-006651-FC

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm while committing a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to 15 to 40 years' imprisonment for the carjacking conviction, 15 to 40 years' imprisonment for the armed robbery conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues defense counsel provided him with ineffective assistance of counsel because he did not introduce a photograph of defendant taken a few days prior to an identification by a victim in a related case, James Slaughter, which would have impeached Slaughter's identification of defendant. We disagree.

"The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). This Court reviews the trial court's factual findings for clear error, and its constitutional determinations de novo. *Id.*

To establish that a defendant's trial counsel was ineffective, the defendant must prove that "(1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.* at 187. A defendant must also establish that the proceedings were fundamentally unfair or unreliable. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.*

Defense counsel's performance did not fall below an objective standard of reasonableness. It was a reasonable trial strategy for defense counsel to avoid emphasizing evidence linking defendant to yet another crime. The photograph was a mugshot. The police took the photograph before the other incidents involving Slaughter, Michael Wright, and Theopolis Burdine occurred; therefore, the jury would not have believed that the photograph was related to the other incidents. This is especially true if defense counsel emphasized the date of the photograph to impeach Slaughter. Furthermore, defense counsel had a less risky impeachment strategy. Defense counsel impeached the victims in the related incidents, based on their differing descriptions of defendant.

Even if defense counsel's performance fell below an objective standard of reasonableness, it was not outcome-determinative error. Even without Slaughter's identification of defendant, the prosecution had three eyewitnesses, including the victim in this case, Paul Patterson, identifying defendant in the crime or related crimes, and some DNA evidence indirectly linking defendant to the crime.

Wright's and Burdine's identifications of defendant, combined with the circumstantial ties to the carjacking in this case, bolster Patterson's identification. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Williams*, 294 Mich App 461, 471; 811 NW2d 88 (2011). "[T]he lack of direct evidence d[oes] not preclude a finding of the defendant's wrongdoing." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). Although Wright and Burdine were victims in separate crimes, circumstantial evidence connected the instant crime to the incidents involving Wright and Burdine. The incident involving Burdine was almost identical to the setup in the Patterson's carjacking. Both were delivery drivers for near eastside Detroit pizza restaurants. Around the same time period, they were both sent to deliver pizzas, and were confronted by a man with a revolver, who ordered them to get down on the ground. A second man then appeared from a hiding spot to rob the respective victims. Finally, the two assailants drove off in the respective victims' car.

Wright independently identified defendant as the perpetrator who shot him. Wright's shooting was connected to Slaughter's car through a picture from a nearby security camera. Defendant was linked, at least with some degree of probability, to the cell phones found in Slaughter's car through DNA evidence on the revolver. The likelihood that all of these connections are coincidences is slim. Therefore, even without Slaughter's identification of defendant, there was more than sufficient evidence to convict defendant of the crime.

Next, defendant argues that the trial court abused its discretion by admitting other bad acts evidence. We disagree.

"The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Wacławski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009), citing *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

To admit a defendant's prior acts evidence:

[f]irst, the prosecutor must offer the [e]vidence under something other than a character or propensity theory. Second, “the evidence must be relevant under MRE 402, as enforced through MRE 104(b).” Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [*People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), quoting *People v Vandervliet*, 444 Mich 52, 81; 508 NW2d 114 (1993).]

“[T]he prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b).” *Id.* Relevant evidence is evidence that has “any tendency to make the existence of any fact that is of consequence to the action more probable or less probable than it would be without the evidence.” MRE 401. The trial court must exclude the evidence if “the only relevance of the proposed evidence is to show the defendant’s character or the defendant’s propensity to commit the crime.” *Knox*, 469 Mich at 510.

Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *People v Blackston*, 481 Mich 451, 461; 751 NW2d 408 (2008), quoting MRE 403. Unfair prejudice exists when there is a danger that the jury will give the evidence undue or preemptive weight, or when it would be inequitable to admit the evidence. *Id.* at 462.

Assessing probative value against prejudicial effect requires a balancing of factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*Id.*]

The prejudicial effect of evidence is best determined by the trial court’s “contemporaneous assessment of the presentation, credibility, and effect of testimony.” *Vandervliet*, 444 Mich at 81.

As a preliminary matter, defendant does not dispute that the evidence of the other crimes is admissible for a proper purpose under MRE 404(b). The other acts are admissible for a purpose other than to show propensity to commit the crime. Slaughter, Wright, and Burdine identified defendant as the perpetrator of crimes connected to the instant offense. As defendant correctly points out, his defense was based on identity. Furthermore, as explained above, the set up in the Burdine carjacking was almost identical to the setup in the instant case.

The trial court’s determination that the probative value of other acts evidence was not substantially outweighed by the prejudicial effect was not an abuse of discretion. On one hand, the other acts evidence was undeniably prejudicial. The evidence indicated defendant was the leader of a multiple-day crime spree, which included several violent attacks on innocent victims.

The testimony about the other acts also took a significant amount of total trial time. On the other hand, the trial court's emphasis on the MRE 404(b) limiting instruction mitigated the prejudicial effect of the evidence. The trial court gave a standard cautionary instruction on the use of MRE 404(b) evidence to the jury once during trial before Wright testified, and once during the jury instructions before deliberations. Additionally, the probative value of the evidence was strong. The case turned on the identity of the perpetrator. Defendant's defense was based on identity. The prosecution introduced the bad acts evidence, at least in part, on an identification theory. Most of the other acts evidence went directly to identity. Wright, Slaughter, and Burdine testified that defendant was the perpetrator in the related crimes, even if there were minor variations in the witnesses' descriptions of defendant. This corroborated Patterson's identification. Slaughter's and Wright's testimony linked defendant to Slaughter's car, which linked him to the cell phones and revolver used in the instant crime. The eyewitness testimony corroborated the DNA evidence, which only indicated that defendant was not excluded from being a donor.

Next, defendant argues that the trial court abused its discretion when it denied defendant's motion for an expert on eyewitness identification. We disagree.

"This Court reviews a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert for an abuse of discretion. MCL 775.15. A mere difference in judicial opinion does not establish an abuse of discretion." *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003).

"[A] defendant may be entitled to have an expert available to help prepare for a trial, even if the expert does not provide a complete defense to criminal liability but, for instance, helps the defense by impeaching the prosecution's experts." *People v Herndon*, 246 Mich App 371, 399; 633 NW2d 376 (2001). "[T]o obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert." *Tanner*, 469 Mich at 443 (citations omitted). A defendant must show more than "a mere possibility of assistance from the requested expert," but rather, "an indication that expert testimony would likely benefit the defense." *Id.*

Defendant failed to show a nexus between the facts of the case and the need for the eyewitness expert. Defendant argues that an eyewitness expert would have benefited his defense. Defendant only alleges that an eyewitness expert would have testified that eyewitness identifications are problematic, especially when the incident involves a weapon. However, this case involves four eyewitness identifications of defendant<sup>1</sup>, two of them provided by eyewitnesses that were confident in their identifications of defendant, encountered defendant in a lighted place, had close encounters with defendant, and struggled with defendant for a period of

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<sup>1</sup> Defendant argues that this Court should only consider Patterson's identification. However, as explained above, the trial court properly admitted the other bad acts evidence under an identity or plan theory. Therefore, it is proper to consider the other eyewitnesses' identifications when considering this issue.

time during the incident. All the witnesses were able to pick defendant out of a lineup. In fact, an eyewitness expert may have been detrimental to defendant's case because defense counsel's thorough cross-examinations of the discrepancies in the eyewitnesses' descriptions of defendant might have been explained by the expert.

Even if defendant's argument that false eyewitness identification can defy common sense, contradicting this Court in *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999) ("stating the obvious: memories and perceptions are sometimes inaccurate"), there is no nexus in this case. The multiple positive identifications of defendant and his revolver, supported with the DNA evidence linking defendant to the revolver found in Slaughter's stolen car, Patterson's cell phone, and the cell phone used to call in the pizza order make an expert's testimony only remotely helpful.

Finally, defendant argues that judicial fact-finding during sentencing violated defendant's right to a jury trial and due process under *Alleyne v United States*, \_\_\_ US \_\_\_, 133 S Ct 2151; 186 L Ed 2d 314 (2013). We disagree.

"We review unpreserved claims, both constitutional and nonconstitutional, for outcome-determinative plain error." *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). "We review de novo questions of constitutional law." *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007). *People v Herron*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 309320, issued December 12, 2013) (slip op at 3).

This issue was recently addressed in *Alleyne*, 133 S Ct 2151 and *Herron*, \_\_\_ Mich App at \_\_\_ (slip op at 3-7). In *Alleyne*, the trial court determined that the defendant had brandished a weapon during an armed robbery, therefore, increasing the statutory mandatory minimum sentence from five years to seven years. *Alleyne*, 133 S Ct at 2155-2156. The United States Supreme Court found that the trial court's judicial fact-finding violated the Sixth and Fourteenth Amendments, because the brandishing "constitute[d] an element of a separate, aggravated offense that must be found by the jury." *Id.* at 2162 ("facts that increase the mandatory minimum sentences must be submitted to the jury.").

In *Herron*, this Court held "judicial fact-finding to score Michigan's guidelines falls within the "wide discretion" accorded a sentencing judge" described in *Alleyne*, 133 S Ct at 2163, Part III-C. *Herron*, \_\_\_ Mich App at \_\_\_ (slip op at 7). *Herron* reasoned that *Alleyne* specifically stated that, "'within established limits[,] . . . the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts[,]'" and "'it is [not] impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute.'" *Herron*, \_\_\_ Mich App at \_\_\_ (slip op at 5), quoting *Alleyne*, 133 S Ct at 2162, quoting *Apprendi v NJ*, 530 US 466, 481; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

Defendant's argument focuses on the applicability of *Alleyne*. Defendant's argument is dependent on this Court treating the Michigan sentencing guidelines range synonymously with the mandatory minimum sentence in *Alleyne*. However, *Herron* rejected that "a presumptive minimum sentencing range is the equivalent of a mandatory minimum sentence." *Herron*, \_\_\_

Mich App at \_\_\_\_ (slip op at 6). Pursuant to MCR 7.215(J)(1), this Court is required to follow *Herron*'s rejection of defendant's argument, and find that *Alleyne* is not applicable here. *Id.*

Affirmed.

/s/ Deborah A. Servitto

/s/ David H. Sawyer

/s/ Mark T. Boonstra